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SUPREME COURT OF LOUISIANA

No. 38,756

LOYD H. MULINA ET AL.

vs.

THE ITEM COMPANY, INC.

IN RE THE ITEM COMPANY, INC., APPLYING FOR WRITS OF PROHIBITION

STATEMENT IN SUPPORT OF JURISDICTION

The appellant, The Item Company, Inc., in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, respectfully represents:

A

Statutory Provision Sustaining Jurisdiction

The statutory provision which sustains the jurisdiction of the Supreme Court of the United States is Section 237(a) of the Judicial Code as amended, reading, to the extent here relevant:

> "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had . . . where is drawn in question the validity of a statute of any state, on the ground of its being

repugnant to the Constitution . . . of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court on appeal."

B

Statute of the State the Validity of Which Is Involved

The statute of the State of Louisiana, the validity of which has been sustained by the Supreme Court of Louisiana, the highest court of said State, as not being repugnant to the Constitution of the United States, is paragraph 9 of Article 165 of the Louisiana Code of Practice, as amended by Act 282 of the Legislature of Louisiana for the year 1940 (pages 1169, 1170-71 of the Acts of 1940), the pertinent provisions of which are:

> "*Trespass.* In all cases where any person, firm, or domestic or foreign corporation shall commit trespass, or do anything for which an action for damage lies . . . such person, firm or corporation may be sued in the parish where such damage is done or trespass committed or at the domicile of such person, firm or corporation."

C

Date of Judgment and Date of Application for Appeal

The date of the judgment of the Supreme Court of Louisiana sought to be reviewed herein was 10 October, 1947. Under the rules of said court no application for rehearing of such a judgment (denying an application for a writ of prohibition) is permitted. The judgment accordingly became final on the date of its rendition. The date on which the application for appeal is presented is 14 October, 1947.

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Nature of the Case and Rulings of the Court Bringing the Case Within the Jurisdictional Provision Relied On

Appellant, The Item Company, Inc., is a Louisiana corporation with its domicile and only place of business in the Parish of Orleans in that State, where it edits, composes, prints and publishes The New Orleans Item, a daily afternoon newspaper of general circulation, entered as second-class mail matter in the United States Post Office in New Orleans.

During the month of May, 1947, the total average daily net paid circulation of The New Orleans Item was 89,809 copies. Of this total, 73,793 were in the City of New Orleans, 1,014 in the Parish of Washington, 10,069 throughout 34 other parishes of the State of Louisiana, and 4,933 in 132 counties in 33 other States throughout the United States.

During that month, the first edition of The New Orleans Item appeared and was sold at 10:30 o'clock each morning on the streets of the City of New Orleans. Copies of the newspaper were distributed in Washington Parish beginning shortly after noon of each day. Many thousands of copies were distributed and sold throughout the City of New Orleans and elsewhere each day before any were distributed in Washington Parish.

On 17 May, 1947, distribution of The New Orleans Item was effected in Washington Parish as follows: Two copies were placed in the United States mails at New Orleans addressed to two subscribers resident in Washington Parish. Twenty-one copies, in the aggregate, were sold to several grocery and general stores and a bar in various places in Washington Parish for resale, being delivered to them by common carrier from New Orleans. All other

copies of the newspaper intended for sale in Washington Parish were sold to distributors for resale under written contracts fixing the status of the distributors as independent contractors, and were delivered to these distributors in that Parish from New Orleans by independent contract carrier. Except for minor and irrelevant details, this method of distribution prevailed throughout the month of May, 1947.

The Item Company, Inc. maintains no office or agent in Washington Parish, nor did it do so at any time during the month of May, 1947. The facts herein recited have been substantially the same since May, 1947, and for some years prior thereto.

Loyd H. Mulina, one of the appellees herein, is the sheriff of Washington Parish, an office which he has held for some eight years, prior to which he was President of the Washington Parish Police Jury for a like period. The other two appellees have also held sundry public offices and been active in political affairs in Washington Parish for many years.

On 23 May, 1947, Mulina filed a suit in the Twenty-Second Judicial District Court for the Parish of Washington, against The Item Company, Inc., seeking $50,000 damages for an alleged libel appearing in The New Orleans Item of 17 May, 1947. The jurisdiction of the court was based on paragraph 9 of Article 165 of the Louisiana Code of Practice, quoted above.

In due time under Louisiana practice, The Item Company, Inc., appearing specially, filed a written exception to the jurisdiction of the Washington Parish Court. This exception pleaded, in effect, that the only possible basis for the jurisdiction of that court would be a construction of the cited codal provision as authorizing the institution of civil actions for damages for libel against publishers of newspapers of general circulation, in any parish or parishes of

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Louisiana in which such newspapers might circulate, even though they may be published elsewhere, and the publishers may have no office or agent in such parish or parishes, an advantage not accorded under Louisiana law or procedure to plaintiffs against defendants in any other form of tort action. It was further pleaded in this exception that such a construction necessarily rendered the cited coda provision invalid on the ground of its being repugnant to the first section of the Fourteenth Amendment to the Constitution of the United States, as denying to publishers of such newspapers the equal protection of the laws, and depriving them of their liberty and property without due process of law by infringing the liberty of the press.

On 11 July, 1947, the exceptions were tried in the district court in Washington Parish. At this hearing the facts were established as herein outlined, and the matter was carefully briefed and presented in oral argument grounded primarily on the asserted unconstitutionality of the codal provision as hereinabove indicated. The court thereupon took the matter under advisement.

On 6 October, 1947, the court rendered its written opinion, conceding that its jurisdiction depended on the validity of the cited statutory provision construed as above set forth. The court stated the grounds on which the codal article was asserted to be invalid quoad the Federal constitution, but nevertheless overruled the exception to the jurisdiction, in effect deciding in favor of the validity of the State statute, so assailed as repugnant to the Constitution of the United States.

Promptly thereafter, without waiving any of its rights under its special appearance to challenge the jurisdiction of the district court, and in strict accord with Louisiana law and practice in such cases, The Item Company, Inc., as relator, applied to the Supreme Court of Louisiana for a

writ of prohibition to restrain the respondent judge from taking jurisdiction of the cause, and the respondents Mulina, Myles and Smith from proceeding further therein.

This application to the Supreme Court of Louisiana, for writs of prohibition, was based on the same grounds as were set up in the exception to the jurisdiction of the Twenty-Second Judicial District Court for the Parish of Washington, a copy of said exception (together with a copy of the original complaint of respondent Mulina) being annexed to the petition for a writ of prohibition, with a copy of the printed brief which had been filed in the district court in support of the exception.

The Supreme Court of Louisiana is the highest court of that State. Under the State constitution, it has supervisory jurisdiction over all inferior State courts, and a writ of prohibition is the proper remedy, under Louisiana law and practice, to restrain a court from exercising jurisdiction improperly.

On 10 October, 1947, the Supreme Court of Louisiana, by memorandum and without opinion, denied the application for a writ of prohibition sought in this case as above set forth. The effect of this judgment was a decision in favor of the validity of paragraph 9 of Article 165 of the Louisiana Code of Practice as against the contention of its repugnance to the first section of the Fourteenth Amendment to the Constitution of the United States.

This proceeding accordingly squarely presents a final judgment in a suit in the highest court of the State of Louisiana where was drawn in question the validity of a Louisiana statute on the ground of its being repugnant to the Constitution of the United States, the decision in which was in favor of its validity, and which is accordingly reviewable by the Supreme Court of the United States on appeal under Section 237(a) of the Judicial Code.

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Grounds upon Which It Is Contended That the Questions Involved Are Substantial

Appellant respectfully represents that the questions involved in its appeal to the Supreme Court of the United States are of a substantial nature. It is well established that an appeal will not be dismissed for want of a substantial Federal question, unless the contentions of the appellant are "clearly not debatable and utterly lacking in merit."[1]

Jurisdiction of the district court over the suit out of which this proceeding has arisen could only rest on the theory that at least one separate cause of action arises in each county in which a libelous newspaper circulates.[2] "There is no escape from the conclusion that separate actions and prosecutions may be simultaneously maintained in every jurisdiction."[3]

On that basis, there would be at least one separate cause of action in favor of Mulina, Myles and Smith against The Item Company, Inc., for damages for publication of the same alleged libel, in each of the remaining 35 parishes of Louisiana, and 132 additional causes of action in favor of each in as many counties in 33 other States in which the newspaper circulates, and which might allow such suits on the same theory if it were sound. This is obviously a question of great moment to all publishers, some of whom issue publications which circulate millions of copies in practically all jurisdictions in the United States and many elsewhere.

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[1] *Hamilton* v. *Regents*, 293 U. S. 245, 258; *Alton R. Co.* v. *Illinois Commerce Comn.*, 305 U. S. 548, 550; *Chesbro* v. *Los Angeles County Flood Control Dist.*, 306 U. S. 459, 463.

[2] Restatement of the Law of Torts, sec. 578 (Comment (b).

[3] *Age-Herald Publishing Co.* v. *Huddleston*, 207 Ala. 40, 43 (1921). See also: *Forman* v. *Mississippi Publishers' Corp.*, 195 Miss. 90, 100 (1943).

The defense of such proceedings might well involve ruinous expense, even if successful.

Such a theory would give to plaintiffs in actions for damages for libel in publications of general circulation, a right to have their claims adjudicated in any forum or forums of their choice. It would create this great disadvantage of selected forums as against this one class of defendants—publishers—alone.

This point has never been determined directly by the Supreme Court of the United States.[4] It has, however, several times been the subject of discussion and determination in other courts. The Supreme Court of Missouri, for instance, has refused "in the name of equal protection and equal rights under the law," to construe a similar statute of that State in such a way as to permit plaintiffs in such libel suits alone to enjoy "this cherished right of picking a forum."[5] The same conclusion has been reached by the Supreme Court of California.[6]

The leading decision on the point is that of *Age-Herald Publishing Company* v. *Huddleston*, characterized by District Judge Kalodner in the Eastern District of Pennsylvania as "highlighting the turn in the law,"[7] from the archaic principle of ubiquitous jurisdiction in actions for damages for libel against newspapers of general circulation,

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[4] In *United States* v. *Press Publishing Co.*, 219 U. S. 1, 15, the Supreme Court of the United States held that because "of the unity between the act of composing and primary publication" of a newspaper in New York, subsequent circulation thereof on the military reservation at West Point was not "an independent offense, separate and distinct from the primary printing and publishing of the libelous article in the State of New York."

[5] Dissenting opinion in *Julian* v. *Kansas City Star Co.*, 209 Mo. 35, 100 (1907); adopted by the Supreme Court of Missouri in *Houston* v. *Pulitzer Publ. Co.*, 209 Mo. 332 (1913), cited with approval in *Truax* v. *Corrigan*, 257 U. S. 312, 339. See also *Jones* v. *Pulitzer Publ. Co.*, 256 Mo. 57 (1914); *Davidson* v. *Pulitzer Publ. Co.*, 178 S. W. 68 (Mo.-1915).

[6] *Graham* v. *Mixon*, 177 Cal. 88, 91 (1917).

[7] *Hartman* v. *Time, Inc.*, 64 F. S. 671, 679 (E. D. Pa.-1946).

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to the modern doctrine of exclusive venue at the place of publication. In the *Age-Herald* case, the Supreme Court of Alabama said: "We do not see how there can be any conflict of opinion as to the unfairness, injustice or impolicy of permitting aggrieved persons, in this class of cases only, to select at their pleasure any judicial forum within the State where the political, religious, industrial, moral or personal predilections of the local citizenship may readily furnish a jury whose biased views will probably be reflected, however sincerely, in a verdict favorable to them." [8]

As has been held by the Supreme Court of the United States, "it is impossible to concede that by the words 'freedom of the press' the framers of the amendment intended to adopt merely the narrow view then reflected by the law of England that such freedom consisted only in immunity from previous censorship." [9]

Such burdens as might well be imposed under the Louisiana statute as construed by the Supreme Court of the State, constitute a veritable sword of Damocles suspended over the head of the press, threatening it with destruction as a penalty for the commission of libel.[10] A recent law review note attributes the modern judicial trend of restricting venue in libel actions to the place of original publication, to the fact that "courts in newspaper cases, are influenced by the ideal of the freedom of the press within decent limits. To secure any measure of freedom of comment by the newspapers, it is necessary that the burden imposed upon them for making statements which may later turn out to be libelous be not too severe." [11]

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[8] *Age-Herald Publishing Co.* v. *Huddleston*, 207 Ala. 40, 56 (1921).

[9] *Grosjean* v. *American Press Co.*, 297 U. S. 233, 248. See also: *Near* v. *Minnesota*, 283 U. S. 697, 714-15.

[10] As suggested by Professor Chafee, a man is not really free to speak if the penalty for slander is unduly severe. Free Speech in the United States, Cambridge, 1941, p. 10.

[11] 81 Univ. of Penna. Law Rev., 855, 861 (May, 1933).

The immediate purpose of this section of the jurisdictional statement is to show the substantiality of the questions involved, rather than to emphasize, at the moment, the correctness of appellant's position. The significance of the issue is pointed by the discussion which it has engendered in legal publications in recent years. The old rule of ubiquitous jurisdiction, it has been said, "is ill-suited to the needs of a culture demanding mass publication," and requires reexamination "in the light of the realities of this century."[12]

It is accordingly respectfully submitted that it is amply apparent that the questions involved in the proceeding at bar are substantial.

F

Stage of Proceedings and Manner in Which Federal Questions Were Raised

As already indicated, the unconstitutionality of the Louisiana codal provision under attack was raised specifically and expressly by pleading, in the exception to the jurisdiction filed by appellant in the court of instance; and it was reiterated in the application to the Supreme Court of Louisiana for a writ of prohibition directed to the court of instance. This unconstitutionality was discussed fully in printed brief and oral argument in the court of instance; and a copy of this brief was filed in the Supreme Court of Louisiana with the application for the writs.

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[12] 59 Harv. Law Rev. 136 (1945). See also: 37 Mich. Law Rev. 553 (1940); 21 New York Univ. Law Qtly. Rev. 309 (1946); 94 Univ. of Penna. Law Rev. 335 (1946).

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Manner in Which Questions Involved Were Passed upon by Court

The district court (State court of instance handed down a written opinion. It stated the constitutional grounds on which the State statute was being attacked, and overruled the exceptions to the jurisdiction in which the unconstitutionality of the Louisiana codal provision was expressly pleaded. The Supreme Court of Louisiana refused to grant writs of prohibition restraining the district court from taking jurisdiction of the causes following its judgment overruling the exceptions to its jurisdiction. Thus both courts effectively passed on the constitutional questions on which the exceptions to the jurisdiction were based, and held the Louisiana codal provision to be valid as against the plea of repugnancy to the Constitution of the United States.

H

Cases Believed to Sustain Jurisdiction

The following cases sustain the jurisdiction of the Supreme Court of the United States:

1. Jurisdiction to entertain an appeal from denial of a writ of prohibition by a State appellate court: *Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.*, 240 U. S. 30; *Detroit, etc., R. Co.* v. *Michigan R. Commission*, 240 U. S. 564; *Missouri* v. *Taylor*, 266 U. S. 200; *Bendini Petroleum Co.* v. *Superior Court of State of California*, 284 U. S. 8; *Michigan Central Co.* 1. *Mix*, 278 U. S. 429.

2. Jurisdiction to entertain an appeal from the decision of a State court on the ground that a State statute violates

the equal-protection clause of the Fourteenth Amendment to the Constitution of the United States; *Smith* v. *Cahoon*, 283 U. S. 553; *Aero Mayflower Transit Co.* v. *Georgia Public Service Com'n*, 295 U. S. 285; *Hartford Steam Boiler Co.* v. *Harrison, Insurance Commissioner*, 301 U. S. 459.

3. Jurisdiction to entertain an appeal from the decision of a State court on the ground that a State statute violates the due-process clause of the Fourteenth Amendment to the Constitution of the United States, by infringing the freedom of the press: *Near* v. *Minnesota*, 283 U. S. 697; *Thornhill* v. *Alabama*, 310 U. S. 88; *Follett* v. *Town of McCormick*, 321 U. S. 573.

WHEREFORE, the appellant, The Item Company, Inc., respectfully submits that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Section 237(a) of the Judicial Code of the United States.

Respectfully submitted,

(Sgd.) EBERHARD P. DEUTSCH of
DEUTSCH, KERRIGAN & STILES,
Attorneys for The Item Company, Inc.,
Petitioner and Appellant.

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No. 436. ITEM COMPANY, INC. *v.* MULINA ET AL. Appeal from the Supreme Court of Louisiana. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Eberhard P. Deutsch* and *R. Emmett Kerrigan* for appellant.

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